

A CONCEPTUAL AND LEGAL ANALYSIS ON HOW FILM CENSORSHIP HAMPERS THE FREEDOM OF ARTISTIC EXPRESSION

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FREEDOM OF ARTISTIC EXPRESSION

Freedom of artistic expression is the principle that an artist should be unrestrained by law or convention in the making of his or her art. All persons enjoy the right to freedom of artistic expression and creativity, which includes the right to freely experience and contribute to artistic expressions and creations, through individual or joint practice, to have access to and enjoy the arts, and to disseminate their expressions and creations.

Artistic freedom is vital to both the cultural and political health of our society. It is essential in a democracy that values and protects the rights of the individual to espouse his or her beliefs, which is why many international human rights instruments recognize and seek to protect the right to artistic freedom of expression, for instance, artistic expression and creativity, are protected under articles 15 of the International Covenant on Economic, Social and Cultural

Rights (ICESCR) and 19 of the International Covenant on Civil and Political Rights (ICCPR).

THE CONUNDRUM CALLED ‘CENSORSHIP’

Censorship, is the anti-thesis to the freedom of speech, expression and information¹. It is in fact the suppression of speech or any information that may be considered harmful, objectionable, sensitive, politically incorrect or inconvenient as determined by governments, media outlets or other figures of authority in a state. That said, it is extremely difficult to attribute one definition to censorship. The qualities of censorship are not reducible to a

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¹ Sarkar S, *Right to Free Speech in a Censored Democracy*, (2009) 7 UNIVERSITY OF DENVER SPORTS AND ENTERTAINMENT LAW JOURNAL 62, (April 28, 2016), <http://www.law.du.edu/documents/sports-and-entertainment-law-journal/issues/07/right.pdf>.

circumscribed and predefined set of institutions and institutional activities, but is produced within an array of constantly shifting discourses, practices and apparatuses. It cannot, therefore, be regarded as either fixed or monolithic. It is a continuous process. This makes it difficult to have a rigid definition for censorship. Many writers argue that censorship cannot be looked at from a single lens and hence needs to have an inclusive definition that responds to the diverse experiences of censorship, and which reflects the socio-historical specificity of instances of control, conditioning or silencing.²

Primarily (but not necessarily) censorship may either be legal or extra legal. Legal censorship is imposed through means strictly authorized by law. It comprises both pre-censorship (pre-dissemination restraints) and subsequent censorship (post-dissemination sanctions), while extra-legal censorship refers to the suppression of information through means not strictly authorized by law³.

Some of the driving rationales behind the concept of censorship around the world are the interests of national security, religious peace

keeping, to control obscenity and hate speech. National security, obscenity and hate speech are definitional grey areas, as they are extremely all-encompassing and hence ambiguous, which makes it problematic to comprehend these terms in the context of censorship because, anything and everything that is even mildly offensive or threatening can and has been subject to censorship which makes it essential to address the concept of censorship in the context of freedom of speech and expression in order to see if it is possible to determine the limits of censorship.

FILM CENSORSHIP- THE INDIAN PERSPECTIVE

The constitution of India, by virtue of Article 19 guarantees its citizens the fundamental right to freedom of speech and expression, such freedom however is not unrestricted and comes with reasonable restrictions. Freedom of speech and expression is the concept of being able to express oneself freely whether through words of mouth, literature, art, or any other medium of communication. It is often regarded as an integral concept in modern liberal democracies. Despite the fact that the Constitution of India does not expressly mention motion pictures as a medium of speech and expression they have been so accepted through the decision of the

² Freshwater H, *Towards a Redefinition of Censorship*, in Müller Beate (ed), *Censorship & Cultural Regulation in the Modern Age* (Rodopi 2004).

³ Banerjee A, *Political Censorship and Indian Cinematographic Laws: A Functionalist Liberal Analysis*, (2010) 2 DREXEL LAW REVIEW 557, (April 26, 2016), <http://ssrn.com/abstract=1672409>.

Supreme Court in the case of *Rangarajan v. P. Jagjivan Ram*⁴, wherein it was held that “Movie doubtless enjoys the guaranty under Article 19(1)(a). Movie motivates thought and action and assures a high degree of attention and retention. It makes its impact simultaneously arousing the visual and aural senses. The combination of act and speech, sight and sound in semi-darkness of the theatre with elimination of all distracting ideas will have an impact in the minds of spectators. In some cases, it will have a complete and immediate influence on, and appeal for every one who sees it. It can, therefore, be said that the movie has unique capacity to disturb and arouse feelings. It has as much potential for evil as it has for good. It has an equal potential to instil or cultivate violent or good behaviour. With these qualities and since it caters for mass audience who are generally not selective about what they watch, the movie cannot be equated with other modes of communication. It cannot be allowed to function in a free market, place just as does the newspapers or magazines. Censorship by prior restraint is, therefore, not only desirable but also necessary”

It is this part of the judgment, that has been conveniently severed from the rest of the

⁴ 1989 SCR (2) 204.

judgment to act as the ‘justification of film certification’ by the Central Board of Film Certification⁵.

One of the most common basis for imposing censorship on films, in India is the paternalistic idea that the Indian audience is immature⁶. This presumption was refuted by the Delhi High Court wherein it held that a film is a work of fantasy and watching a feature film is the conscious choice of the spectator and person offended by the content or the theme of the film is free to avoid watching the film⁷.

The UN ‘Report of the Special Rapporteur in the field of Cultural Rights’ recognized the concerns with censorship or unjustified restrictions of the right to freedom of artistic expression and creativity to be devastating. The report stated that censorship generates important cultural, social and economic losses, deprives artists of their means of expression and livelihood, creates an unsafe environment for all those engaged in the arts and their audiences, sterilize debates on human, social and political issues, hamper the functioning of democracy and most often also

⁵ (April 27, 2016), http://cbfcindia.gov.in/html/uniquepage.aspx?unique_page_id=6

⁶ Sidharth Bhatia, *Censorship in India is Based on the Paternalistic Idea that Citizens are not Mature*, THE WIRE (April 28, 2016), <http://thewire.in/2016/01/02/censorship-in-india-is-based-on-the-paternalistic-idea-that-citizens-are-not-mature-18461/>.

⁷ W.P (C) No. 112/2015.

impede debates on the legitimacy of censorship. The fear censorship generates in artists and art institutions often leads to self-censorship, which stifles art expression and impoverishes the public sphere. Artistic creativity demands an environment free from fear and insecurity⁸.

Censorship in India, is not imposed and exercised only and exclusively by the Central Board of Film Certification, there have been instances of the government imposing a ban on a number of films on the ground that such films pose a potential danger to communal harmony and religion thereby potentially affecting peace and harmony of a state. Such bans are imposed by issuing government advisories or notifications⁹. In fact, the court has held in the case of *Rangarajan v. P. Jagjivan Ram*¹⁰ that freedom of expression cannot be suppressed merely on account of threat of demonstration and processions or threats of violence. Such an act would tantamount to the negation of the rule of law and a surrender to black mail and

intimidation. It is the duty of the state to protect the freedom of expression since it is a liberty guaranteed against the State. The State cannot plead its inability to handle the hostile audience problem. It is its obligatory duty to prevent it and protect the freedom of expression. In the case of *Ajay Gautam v. Union of India*¹¹, a case that concerned the movie 'PK' and its portrayal of god men as being demeaning to Hindus, thereby being violative of Articles 19(2) and 25 of the Constitution of India, the court held that free speech cannot be suppressed on the ground either that its audience will form harmful beliefs or may commit harmful acts as a result of such beliefs, unless the commission of harmful acts is a real close and imminent consequence of the speech in question. The anticipated danger should not be remote, conjectural or far-fetched. It should have proximate and direct nexus with the expression.

This paper, specifically deals with censorship that has been imposed and exercised by the The Central Board of Film Certification and how the cuts/excisions/additions ordered by the board have been, a lot of times unreasonable, unwarranted and an infringement of the right of expression thus hampering the creative process and artistic freedom.

⁸ Fareeda Shaheed, *Report of the Special Rapporteur in the Field of Cultural Rights*, UNITED NATIONS GENERAL ASSEMBLY (A/HRC/23/34, March 14, 2013), (April 27, 2016), http://www.cdc-cdd.org/IMG/pdf/The_right_to_freedom_of_artistic_expression_and_creativity.pdf.

⁹ Press Trust of India, *Ram Rahim Singh's 'Messenger of God' screening banned in Punjab, § 144 Imposed in Sirsa after Protest*, INDIAN EXPRESS, (April 28, 2016), <http://indianexpress.com/article/india/india-others/messenger-of-god-controversy-tension-in-pockets-of-sirsa-section-144-imposed-at-places/>.

¹⁰ 1989 SCR (2) 204.

¹¹ Delhi High Court, W.P.(C) No.112/2015.

THE CENTRAL BOARD OF FILM CERTIFICATION (CBFC)

The Central Board of Film Certification is a statutory body that regulates the public exhibition of films in India. It was constituted by the Ministry of Information and Broadcasting in accordance with § 3(1) of the Indian Cinematographer Act of 1952. Films in India can be exhibited publicly only upon the certification of the CBFC. The CBFC is divided into a two-tier jury system for the purpose of certification of films, these two tiers include- The Examining Committee and the Review Committee. It also includes an appellate tribunal known as the Film Certification Appellate Tribunal.

§ 5A¹² of the Act, provides for the various categories of certification of films, namely:

U- Films suitable for unrestricted public exhibition,

UA- Films which contain portions considered unsuitable for children below the age of twelve, but otherwise suitable for unrestricted public exhibition.

A-Films considered suitable for exhibition restricted to adults only

S- Films restricted for exhibition to members of any profession or class of persons.

This body certifies films in accordance with § 5(B) of the Cinematograph Act¹³, which states that “*A film shall not be certified for public exhibition if, in the opinion of the authority competent to grant the certificate, the film or any part of it is against the interests of the sovereignty and integrity of India] the security of the State, friendly relations with foreign States, public order, decency or morality, or involves defamation or contempt of court or is likely to incite the commission of any offence*”. It is important to note that the Cinematograph Act, 1952 only provides regulation of films by certification or non-certification and nowhere does it have an explicit mention of the power of the Censor Board censorship of films. The CBFC derives the power to censor films from Rule 26 of The Cinematograph Rules of 1983, which provides that the regional officer can issue a certificate upon the satisfaction of the condition that a specified portion/portions be removed from the film and that the portion/portions objected to have been excised from the negative of the film

¹² The Cinematograph Act, 1952, § 5A.

¹³ The Cinematograph Act, 1952, § 5B.

and from all copies thereof¹⁴. The Act also empowers the Central Government to issue directions setting out the principles which shall guide the CBFC.¹⁵¹⁶

The Supreme Court has held that the requirement under the Cinematograph Act of 1952, relating to certification, by the censor board where the film is intended for public exhibition by applying the principles set out in § 5B is a reasonable restriction on the exercise of the said right of speech and expression contemplated under Article 19(2) and therefore, constitutional¹⁷

THE CENTRAL BOARD OF FILM CERTIFICATION AND ITS CENSORSHIP REGIME

The varied courts of our country, have time and again tried to set limits to the powers of the CBFC and recognized the CBFC's constant imposition of censorship, in the form of cuts/deletions/additions as a hindrance to artistic freedom and the creative film making process

The case of *Bobby Art International v. Om Pal Singh Hoon*¹⁸ is important for this

¹⁴ Cinematograph Rules, 1983, Rule 26.

¹⁵ The Cinematograph Act, 1952, § 5B.

¹⁶ (April 28, 2016), http://cbfcindia.gov.in/html/uniquepage.aspx?unique_page_id=1.

¹⁷ AIR 2007 SC 1640.

¹⁸ (1996) 4 SCC 1.

purpose. The question that came up for consideration was with regards to an objection on the basis of decency and morality regarding certain graphical scenes involving rape and abusive language in the movie *Bandit Queen* which was based on the life of the erstwhile dacoit Phoolan Devi. The court, asserted the importance of the guidelines issued by the Central Government to the CBFC to certify films holding that authorities concerned with film certification to be responsive to the values and standards of society and take note of social changes. They are required to ensure that '*artistic expression and creative freedom are not unduly curbed*'. The court also cited the then Chief Justice Hidayatullah's opinion in the *K.A. Abbas v. Union of India*¹⁹ case to demarcate the censor's duties so as to not hamper with artistic freedom, the court opined that "*the task of the censor is extremely delicate and his duties cannot be subject of an exhaustive set of commands established by prior ratiocination but direction is necessary to him so that he does not sweep within the terms of the directions vast areas of thought, speech and expression of artistic quality and social purpose and interest. Our standards must be so framed that we are not reduced to a level where the protection of the least capable and the most depraved*

¹⁹ (1970) 2 SCC 780.

amongst us determines what the morally healthy cannot view or read. The standards that we set for our censors must make a substantial allowance in favour of freedom thus leaving a vast area for creative art to interpret.”

In the case of *Anand Chintamani Dighe v. State of Maharashtra*²⁰, the court recognized the importance of artistic freedom in a democratic society and held that the law does not have to accept the views which have been expressed by the petitioner in the play in order to respect, the rights of the petitioner as a playwright to express those views. Respect for and the tolerance of a diversity of viewpoints is what ultimately sustains a democratic society and Government. The right of the playwright, of the artist, writer and of the poet will be reduced to husk if the freedom to portray a message whether it be in canvas, prose or verse is to depend upon the popular perception of the acceptability of that message. Popular perceptions, however strong cannot override values which the constitution embodies as guarantees of freedom in what was always intended to be a free society.

In another case, *Anand Patwardhan v. Central Board of Film Certification*²¹, a writ petition was filed to challenge the order by the

FCAT that directed two cuts and one addition in the petitioner’s documentary film titled “*War and Peace*”(Jang Aur Aman) that dealt with the journey of peace activism the face of global militarism and war on the grounds that the scenes would affect public order and hurt the sentiments of various religious communities. The Bombay High Court, later on found that this did not affect public order in any way and the cuts were recommended merely to harass the petitioner and left it to the discretion of the petitioner as to whether he wanted to add any scenes or not. It was held that the cuts ordered by the FCAT affect the freedom of speech and expression of the petitioner under Article 19(1)(a) of the Constitution. The court in this case also recognized artistic freedom as extremely integral to the entire creative process and held that the film makes a powerful plea for peace and shows the damaging effects of war and nuclear weapons. Aside from various visuals and interviews, it makes an artistic use of songs, dances and music which have their own impact and any forced addition violates the artistic freedom of the film maker to film and edit his material and to decide what goes well with the film as a whole and what conveys the message most truthfully and effectively".

LACUNA IN THE LAW

²⁰ Bombay High Court, 2002 (1) BomCR 57.

²¹ (2003) 5 BomCR 58.

The Cinematograph Act provides that a certificate granted by the Board shall be valid throughout India for a period of ten years²². This provision exposes a few major lacunas in the law. Firstly, it doesn't provide for any system or scheme of what happens on the expiry of the certificate nor for the renewal of such a certificate. Does this then imply that, a filmmaker whose film was subject to the scissors of the censor board can now publicly exhibit the film retaining the cuts that were originally ordered by the censor board? Even though such footage is surrendered to the censor board, it is very likely that the film-maker will still have possession of such footage. Such a lacuna, then means that filmmakers and artists, can make more profits out of already existing films, by bringing out uncensored/uncut version of their film, years later, thereby unearthing their suppressed artistic freedom of expression. Secondly, it remains unclear as to whether feature films, documentaries and short films being released on internet video streaming sites require certification by the CBFC?

This existing information gap is primarily beneficial for small time filmmakers and documentary film-makers, who often bear the brunt of censorship by the CBFC²³. This gap

can enable such filmmakers to put up their content online for unrestricted public viewing without any cuts/restrictions or direct intervention by the CBFC.

Also, the Act, at many places provides for certification only restricted to public exhibition of films in India. What remains unanswered is what happens Indian films that release over-seas, considering the huge market for such films? Does this permit a film-maker or artist to release his/her film over-seas without any cuts ordered by the CBFC, considering certification is restricted only to India.

Such gaps in the law, in fact, are beneficial for film-makers as it helps circumvent the CBFC requirements and enables them to exercise their freedom of artistic expression.

CONCLUSION

A committee headed by filmmaker Shyam Benegal recently submitted a report to the government suggesting certain amendments to the Cinematograph Act, 1952. The committee, was constituted to lay down a holistic framework for certification of films and lay down guidelines to ensure that artistic expression and creative freedom are not unduly curbed in the process of classification of films²⁴.

²² The Cinematograph Act, 1952, § 5A (3).

²³ Pankaj Butalia, *Two Laws on Censorship*, INDIAN EXPRESS, (October 24, 2015),

<http://indianexpress.com/article/opinion/columns/two-laws-on-censorship/>.

²⁴ (28 April, 2016), <http://pib.nic.in/newsite/PrintRelease.aspx?relid=142288>.

The committee in its report suggested that the CBFC should only be a film certification body and its scope must be restricted only to the issuance of certificates on the basis of age and maturity. The committee also suggested a sub-division of categories for certification under the UA category as UA12+ and UA15+ and also under the Adult category as A and AC (Adult with Caution)²⁵. Additionally, I suggest that the categories of certifications be expanded not only on a suitable for age basis but also on a content basis, for example, films that deal extensively with religious issues and have the potential of affecting communal harmony, can be certified as ‘R’ (excessive religious content) or films that lampoon political structures or parties in the country can come with a ‘P’ certification (excessive political content). Such a system would allow for the public exhibition of every kind of film and also help the audience or viewer make a rationale decision as to whether they wish to watch a film or not based on the content of the film. Such a rating system would make for an all-accommodating certification framework.

Secondly, the CBFC must act autonomously or even privately without the

control or supervision of the government and lay down broader guidelines with regards to film content. In fact, the board must consist of people from the film industry, who could set certain common-sense based guidelines and steer clear from either regulation or censorship. A good place to derive such guidelines would be the YouTube community guidelines, that provide safeguards yet allow for the dissemination of any and all kinds of content, for instance, YouTube’s community guidelines provide that sexually explicit content like pornography and violent, graphic, or humiliating fetishes are not allowed to be shown on the website but this is not a blanket restriction, in fact, a video that contains nudity or other sexual content may be allowed if the primary purpose is educational, documentary, scientific, or artistic, and it isn’t gratuitously graphic and such videos, depending on their severity, can be age-restricted²⁶. Such guidelines are not a direct curb of artistic freedom, one is free to show what they want and how they want it subject to it is not illegal, they do not have to cut out content, simply because it hurts certain religious sentiments, the important thing with such a guidelines structure is that content is out there, freely accessible and the choice to access such content must clearly lie with the viewer.

²⁵ A Breakdown of Everything We Know About the Shayam Bengal Committee’s Report to Reform the Censor Board, HUFFINGTON POST, (April 28, 2016), http://www.huffingtonpost.in/2016/04/27/shyam-bengal-committee-r_n_9783646.html.

²⁶ (April 27, 2016), <https://support.google.com/youtube/answer/2802002>.

As film censorship hampers artistic freedom and interferes with the creative process of film making, there must exist structures and systems that only provide for film regulation and certification and not censorship and such systems and structures must, while regulating content of films, also hold the ideals of freedom of artistic expression to its highest standard.